

Commonwealth's
Attorney
Harvey L. Bryant

Chief Deputy
Colin D. Stolle

Deputies
Patrick J. Connolly
Philip C. Hollowell
David W. Laird
Scott M. Lang
Thomas M. Murphy
Scott C. Vachris

COMMONWEALTH OF VIRGINIA



OFFICE OF THE COMMONWEALTH'S ATTORNEY CITY OF VIRGINIA BEACH

2425 Nimmo Parkway
Virginia Beach, VA 23456-9050

(757) 385-4401

FAX (757) 385-1288

TDD : 711

<http://www.vbgov.com/dept/voca>

Direct Dial : (757) 385-8978

June 20, 2012

Deputy of
Administration
Susan G. Hooks

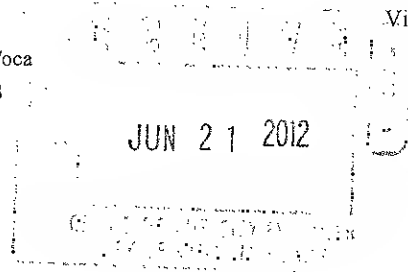
Paralegal Supervisor
Jaye L. Koch

Prosecution
Support Team
Mary Ann C. Sykes

Victim-Witness
Program
Corey J. Burdin

Administrative Support
Group
Wicki P. Rogers

6/21/12
*UPDATE
JKS



Mr. James K. Spore
City Manager
Municipal Center
Virginia Beach, VA 23456

Chief James Cervera
Virginia Beach Police Department
Municipal Center
Virginia Beach, VA 23456

RE: Use of Deadly Force by Officers Theodore Ziaja, James Edwards, and Shaun Kelly

Dear Mr. Spore and Chief Cervera:

This office has completed its investigation of the use of deadly force by Officers Theodore Ziaja, James Edwards, and Shaun Kelly. On March 17, 2012, at approximately 3:30 p.m. Officer Ziaja discharged his department issued carbine rifle one time at Daniel Guy Newcomb. This incident occurred around the Restaurant Depot located at 5112 Virginia Beach Boulevard in the City of Virginia Beach. Daniel Guy Newcomb received a single gunshot wound to the chest as a result of the round fired by Officer Ziaja. According to the autopsy, the round entered in the center of the chest and exited the left side of Mr. Newcomb. The round then reentered in the upper left arm and was recovered from that same area. The autopsy found the gunshot wound to have produced lethal injuries.

On the date referenced above, at approximately 3:00p.m. Newcomb robbed the Tropical Smoothie Café located 401 North Great Neck Road in the City of Virginia Beach. Witnesses described him as being armed with a dark colored long barreled gun. Newcomb made off with \$300.00 in cash from the robbery. An employee of the café watched Newcomb get into an older white four door car and provided a partial Virginia license plate of "YLN."

Not long after the robbery, 911 dispatchers received a call of a "hit and run" accident at Pembroke Mall outside of Jason's Deli. Sergeant Rubbo responded and as he arrived on scene he saw a vehicle matching the one used in the robbery speeding away. He was able to get full license plate number of "YLN-6729." Multiple police vehicles gave pursuit as Newcomb tried to escape at speeds of 65 to 70 mile per hour on Independence Boulevard. Newcomb made a left onto Jericho Road and another Left on Witchduck Road as the pursuit continued. Eventually, he crashed into an uninvolved citizen's vehicle. Newcomb's and the citizen's vehicles were disabled as a result of the crash.

Officer Kelley arrived immediately at the crash scene. The Officer approached Newcomb only to see him exit his vehicle with a rifle. Kelley gave Newcomb commands to drop the rifle, but Newcomb instead pointed the rifle in Officer Kelley's direction. Officer Kelley then repeatedly discharged his police issued .9 mm handgun at Newcomb.

Officer Edwards arrived on the scene as Newcomb was exiting his vehicle. He also observed the rifle in Newcomb's hands and saw him point the rifle at Officer Kelley. Believing that Officer Kelley was about to be killed, Officer Edwards drew his police issued carbine rifle and repeatedly discharged the weapon at Newcomb.

There were a total of 23 shots fired by Officers Kelly and Edwards. Surprisingly, Newcomb was not hit and was able to make his way to the front of the Restaurant Depot building.

Officer Ziaja arrived in the area and heard the shots being fired from the crash scene. He grabbed his carbine rifle as he saw Newcomb run to the front of the building. He gave pursuit and lost sight of Newcomb as he went around the corner. When Ziaja rounded the corner, he observed store customers crouching down and pointing to the bed of a pick-up truck. The truck was backed up to the front of the store. Officer Ziaja knelt down behind a car that was between him and the pick-up truck. As Officer Ziaja aimed his weapon at the truck, he saw Newcomb slightly raise his head and look at the officer. Newcomb then lowered his head and then popped up with the rifle in his hand. Newcomb proceeded to point the rifle in the direction of Officer Ziaja. Officer Ziaja fired one time striking Newcomb in the chest knocking him out of the bed of the truck and onto the ground. Officers immediately began CPR in an attempt to assist Newcomb.

Newcomb was pronounced dead on the way to the hospital. The black rifle recovered from the scene that had been in Newcomb's possession turned out to be a toy rifle.

Detectives conducted an interview the same day with Daniel Guy Newcomb's grandmother, Mrs. Eleanor Newcomb. Mrs. Newcomb advised that her grandson was bipolar, suffered from depression and she believed him to be suicidal. She told the detectives that she did not believe that her grandson had used drugs for the past four or five years. However, the toxicology report contained in Newcomb's autopsy shows that he had cocaine in his system at the time of his death. Mrs. Newcomb went on to explain to the detectives that in 2009, her grandson had made a false report to the Norfolk Police Department. He called and reported that


he had just shot and killed his girlfriend. Norfolk Police responded and eventually shot Newcomb in his backyard. Newcomb survived the injuries he sustained in what was an apparent "suicide by cop" attempt.

My review of the investigation in this case consists of reports, observations, and an independent investigation conducted by Investigator Richard Whitt of my office, as well as an extensive report containing numerous interviews, diagrams, photos and other pertinent information prepared by Sergeant R. D. Markle of the Virginia Beach Police Department.

The legal issue that I must consider in connection with shooting incidents investigated by this office is whether the officer's actions were "objectively reasonable in light of the facts and circumstances confronting them." Tennessee vs. Garner, 471 U.S. 1 (1985); Elliott vs. Leavitt, 105 F3d 174 (4th Cir. 1996). Four years after Garner, the United States Supreme Court said, "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene and its calculus must embody an allowance for the fact that police officers are often forced to make split-second decisions about the amount of force necessary in a particular situation." Graham vs. Connor, 490 U.S. 386 (1989).

Based upon the law and the substantial evidence in this matter, it is my opinion that Officer Shaun Kelly, Officer James Edwards, and Officer Theodore Ziaja were within their legal authority and justified in the use of their firearms in the situation as it presented itself. There was no possible way for these officers to know or have any suspicion that the rifle carried and brandished by Newcomb, was not in fact a real firearm. Their actions were appropriate under the circumstances, and were initiated to protect themselves, and potentially other citizens from serious bodily injury or death. Therefore, no charges will be prosecuted by this office against Officer Shaun Kelly, Officer James Edwards, or Officer Theodore Ziaja for their conduct in this case.

Sincerely yours,

By: 
Harvey L. Bryant
Commonwealth's Attorney

CC: Deputy Chief John Bell, Professional Standards
Mr. Dave Hanson, Chief Operating Officer